IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7677 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

IDRISH ALIAS IDRISHBAPU SAIYEDHUSAIN SAIYED

Versus

POLICE COMMISSIONER FOR THE CITY OF AHMEDABAD

Appearance:

1. Special Civil Application No. 7677 of 2002

MR ANIL S DAVE for Petitioner No. 1

MS BANNA S DUTTA for Petitioner No. 1

MR VM PANCHOLI, AGP for Respondent No. 1-3

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 04/03/2003

ORAL JUDGEMENT

#. By filing this petition, the petitioner-detenu has

challenged his detention order dated 4.1.2002. By the impugned order, the petitioner-detenu is detained in exercise of the powers under section 3(1) of the Gujarat Prevention of Antisocial Activities Act,1985 (hereinafter referred to as "the PASA" for short), as, the detaining authority found that the detenu is a "bootlegger" and is required to be detained under the preventive detention, so that, he may not continue with such type of illegal activities.

#. Along with the detention order, the detenu was also served with the grounds of detention of the same date. In the said grounds, there is a reference of two criminal cases, which are filed under the provisions of the Bombay Prohibition Act. In the grounds of detention, the statements of certain witnesses have been recorded.

#. At the time of hearing of this petition, it is argued by the learned advocate for the petitioner that the detaining authority has recorded statements of witnesses on 3.1.2002 and, thereafter, on very next date, i.e. on 4.1.2002, the detention order is passed. He submitted that, it should be presumed that the order is passed in a mechanical manner, as, it is not possible that the authority will consider entire thing in a day. For that purpose, the learned advocate for the petitioner relied upon the judgment in the case of Ranubhai Bhikhabhai Bharwad (Vekaria) v. State of Gujarat and others, reported in 2000(3) GLR 2696, wherein in para 9, the Court has observed as under.:

"Learned Asstt. Government Pleader has submitted that in the instant case, the proposal was made by the sponsoring authority on 27th August 1999. However, he is not in a position to say as to on what date it was received by the detaining authority itself. However, one fact is established that the verification of the witnesses has been made by the detaining authority on 29th August, 1999, and therefore, it must have reached the detaining authority at least on 29th August 1999 and on the next day, i.e., on 30th August 1999, the detention order has been passed. An identical situation had come up before a Division Bench of this Court in the case of Kalidas C.Kahar v. State of Gujarat & Ors., reported in 1993(2) GLR 1659. In para 6 of this decision at page 1662, the contention has been dealt with that the detaining authority had wrongly exercised the power under Sec. 9(2) of the P.A.S.A. Act and by such wrong exercise of

powers the detenu's right to make a representation under Art. 22(5) of the Constitution of India had been infringed. It was also considered that by statements of the witnesses had been recorded on 15th October, 1992 and the said statements had been verified by the Supdt. of Police 'C' Division, Baroda City on 16th October, 1992. The proposal in the case was made on 16th October 1992 and the order of detention was passed on 17th October 1992. The Division Bench noticed that it was rather curious that the entire bunch of material was supplied by the sponsoring authority at the time of making the proposal and that has been promptly accepted by the detaining authority and passed the order on the next day itself. It has been further observed that at the time of exercising the privilege under Sec.9 (2) of P.A.S.A., a balance is required to be struck between the public interest on the one hand and the right of the detenu to make a representation under Art.22 (5) of the Constitution on the other. If the statements of the witnesses are to be relied on, they must be genuine statements of the real persons. The detenu would like to verify as to whether these persons are fictitious persons or not and/or whether their statements are bogus statements or not? Unless the detenu knows the names and addresses of the persons who have given the statements, he cannot verify the aforesaid facts and if the names and addresses along with the contents of the statements are supplied to the detenu, he can have full opportunity to verify the position and make an effective representation on that basis. As against this, there is a provision under Sec.9 (2) carved out on the basis of Art.22 (5) of the Constitution which provides that nothing in sub-sec.(1) shall require the authority making such order to disclose facts which it considers to be against the interest to disclose. The Division Bench has held that it is the duty of the detaining authority to strike a balance as stated above, that in public interest the names and addresses of the witnesses could not be disclosed. This should not be treated as an idle formality as it affects the public interest on the one hand and the right of the detenu on the other. When that is so, the detaining authority is expected to do some exercise before actually exercising the privilege under Sec.9 (2) of the P.A.S.A. The

Division Bench found in the facts and circumstances of the case before it that the verified statements were also placed before the detaining authority and there was no sufficient time for the detaining authority to examine the possibility of exercising the power under Sec.9 (2), as the proposal was made on 16th October 1992 and the order of detention was passed on the following day, i.e. 17th October 1992, nor is there any material to show as to how he examined the necessity of exercising the power under Sec.9 (2). Under the circumstances, the Division Bench held that it was a wrong exercise of power under Sec.9 (2) which has affected the detenu's right of making an effective representation under Art.22 (5) of the Constitution of India, and therefore, the continued detention of the detenu is bad and illegal and the impugned detention order was bad and illegal. The facts of the present case are in close proximity to the facts which were considered by the Division Bench in the aforesaid case inasmuch as it has already been pointed out that the statements of the three witnesses in the instant case which were recorded before the Police Inspector on 17th August, 1992, 21st August, 1999 and 25th August, 1999 with regard to the incidents dated 10th July, 1999, 13th June, 1999 and 26th June, 1999 were the material along with the proposal which is said to have been made on 27th August, 1999 and it is clear from the record that it was on 29th August, 1999 that the detaining authority has recorded its verification of all these three statements. There is nothing on record to show that the detaining authority had considered the proposal dated 27th August, 1999 at any time prior to 29th August, 1999 and on 29th August, 1999, all that has been done is that the concerned witnesses have stated before the detaining authority that the statements as had been made on the respective dates were correct and immediately thereafter on the following day, i.e. on 30th August, 1999 the detention order has been passed. Therefore, I find that identical fact situation as was obtaining in the case before the Division Bench is there, and it is a case of wrong exercise of power under Sec. 9(2) of the Act because the detaining authority had no sufficient time for the purpose of verification of the facts which were required for the purpose of satisfaction to invoke privilege under Sec. 9(2). Merely

because in the facts before the Division Bench the proposal itself was made on 16th October, 1992 and the order was passed on 17th October, 1992 and in this case the proposal was made on 27th August, 1999, the verification of the statements were made by the detaining authority on 29th August, 1999 would not make any difference. Such a difference of a day or two here and there is hardly sufficient to inspire confidence that the detaining authority had the sufficient time for the purpose of verification of the facts which are necessary to lead to invoking the privilege under Sec. 9(2) of the Act. In this case also the manner in which the verification has been recorded of the statements made by these three witnesses for the purpose of Sec. 9(2) shows that the same has been done only as an empty formality inasmuch as the same witnesses had been called before the detaining authority and the detaining authority had recorded that whatever the statements made by the witnesses were correct. Thus, the whole exercise appears to have been done as a mechanical exercise and it is not borne out that there is an active application of mind on this aspect of the matter by the detaining authority for the purpose of verification of the facts as had been disclosed by the witnesses so as to express the fear and to invoke the privilege under Sec. 9(2) against the disclosure of the names and addresses of the witnesses and it thus appears on the basis of the ratio of the decision of the Division Bench that it is a case of wrong exercise of power under Sec. 9(2) and it is established that in such cases, the wrong exercise of power under Sec. 9(2) adversely affects the detenu's right of making an effective representation guaranteed under Art. 22(5) of the Constitution of India. This Court quite appreciates in such cases the predicament or the dilemma of the detaining authority inasmuch as, when the action is taken promptly, it is argued that the action has been taken in a hot haste and if the same is taken after lapse of some time, it is said that the action is delayed, and therefore, the same stands vitiated. In order to combat this argument, the Division Bench has rightly observed that a balance has to be struck in such cases between the public interest and the right of the detenu to make an effective representation. The detaining authority is, therefore, required to

act in such a manner that this balance is maintained. Once the materials are placed before the detaining authority with the proposal by the sponsoring authority, it must have reasonably sufficient time for the purpose of verification of the facts and the consideration of the entire material with an active application of mind and the order has to be passed at the earliest opportunity, but in this process to strike the balance between the public interest and the right of the detenu either of the two should not be defeated in any manner and the whole process must indicate that the detaining authority had applied its mind with the requisite approach and it had also devoted sufficient time before arriving at the decision to claim the privilege under Sec. 9(2) of the Act and also to come to the conclusion that the detenu was required to be detained immediately. In facts of the present case, I find that this requirement of maintaining the balance has been defeated and the detention order has been passed on 30th August 1999, i.e., on the next day to the date on which the materials were considered by the detaining authority. In this regard, decisions of this Court rendered in different cases on different dates, but I find that it is not necessary for me to deal with all those unreported decisions insofar as this point is concerned, the matter stands fully covered by the Division Bench decision to which the reference has been made hereinabove."

#. The detaining authority has filed the affidavit-in-reply and has tried to explain the delay wherein in para 16 it is stated as under.:

"With reference to para 23 of the petition, I say that the last offence was registered against the detenu on 23.8.2001. However, the detenu was absconding and evading the arrest. Therefore the sponsoring authority was making necessary enquiries about the whereabouts of the detenu and in the meantime on receiving necessary information about the anti-social activities of the detenu, the sponsoring authority has recorded the statements in the unregistered cases on 31.12.2001 and 1.1.2002. After collecting necessary information, the sponsoring authority has submitted his proposal on 1.1.2002. On

receiving the same, I have followed necessary procedures to verify the veracity, genuineness and correctness of the statements of witnesses and the incidents narrated in it by calling the witnesses to my office personally on 3.1.2002. Thereafter, after taking into consideration all the materials placed before me, facts and circumstances of the case as well as legal provisions applicable to the facts of the case, looking to the urgency of the matter, I have passed the order of detention on 4.1.2002. I say that the detenu was absconding and avoiding his detention. Therefore a notification was issued to declare him as an absconder and copy thereof was affixed in front of the main door of his house in the presence of panchas and necessary panchnama was also made in this regard. Therefore the contention raised by the detenu in this para is not tenable at law."

#. Considering the facts and circumstances of the case and considering the judgment referred to above, in my view, it can be presumed that the order is passed in a mechanical manner, as, this Court has considered more or less the same type of situation in the judgment referred to above. In that view of the matter and in view of the aforestated judgment, the order of detention is required to be quashed and set aside.

#. In view of what is stated above, the petition is allowed. The order of detention dated 4.1.2002 is quashed and set aside. The detenu Idrish Alias Idrishbapu Saiyedhusain Saiyed is ordered to be set at liberty forthwith if he is not required in connection with any other case. Rule is made absolute accordingly.

(P.B.Majmudar,J)
(pathan)